Before the 94-123

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re

Constitutionality of
Section 73.658(k)
of the Commission's Rules
("Prime Time Access Rule")

To: The Commission

REPLY TO COMMENTS ON PETITION FOR DECLARATORY RULING

FIRST MEDIA CORPORATION

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SUMMARY

First Media Corporation seeks a declaratory ruling that the Prime Time Access Rule ("PTAR") is no longer enforceable under the constitutional analysis in the Commission's decision to eliminate the Fairness Doctrine. The contrary arguments made by the opposing parties are without merit.

The purpose of declaratory rulings is to resolve uncertainty about the Commission's rules. On the face of the pleadings already filed in this matter, there is substantial uncertainty about the continuing constitutionality of PTAR. Moreover, the Commission has not only the authority but an obligation to consider the constitutionality of all its rules. Where core factual circumstances change over time, as here, the Commission must revisit the constitutionality of even those regulations that have previously been found to pass constitutional muster.

The Commission has correctly determined that the concept of spectrum scarcity is obsolete in First Amendment analysis of broadcast content regulations. Cable television and other alternative delivery systems have made access to video transmission technology as unlimited as access to print media. Therefore, spectrum scarcity no longer justifies different First Amendment treatment of broadcast media.

The Supreme Court's recent Metro Broadcasting decision upholding Congressionally mandated minority ownership preferences does not establish that PTAR remains constitutionally enforceable. Content regulations like PTAR are subject to a stricter constitutional standard than the racial preference classifications at issue in Metro Broadcasting. Since spectrum scarcity no longer justifies content restrictions, PTAR does not meet the stricter First Amendment test.

There is no merit to the argument that PTAR is not a content-based regulation since it does not deal with the presentation of controversial issues. The program definitions in PTAR inescapably turn on content and require the Commission to make determinations based on content. Moreover, a program regulation that bars a licensee from broadcasting what it wants to broadcast when it wants to broadcast it is a direct restraint on editorial judgment and control.

Finally, it is irrelevant to the constitutional analysis that the networks still retain a large (though diminishing) share of the prime time audience. If there is no longer an inherent electromagnetic limitation on access to mass audiences, economic factors cannot substitute as a justification for content regulation under the First Amendment.

In short, PTAR is no longer constitutionally enforceable, and the Commission should so rule.

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First Media Corporation ("First Media") hereby replies to the comments on its petition for declaratory ruling filed by Henry Geller ("Geller") on May 7, 1990, Media General Broadcasting Group, et al. ("Media General") on August 17, 1990, the Association of Independent Television Stations, Inc. ("INTV") on September 7, 1990, the ABC Television Affiliates Association ("ABC Affiliates") on October 22, 1990, and NATPE International ("NATPE") on April 9, 1991.

I. BACKGROUND

1. In its petition for declaratory ruling, First Media has asked the Commission to rule that enforcement of the Prime

Time Access Rule ("PTAR") is no longer constitutionally permissible in light of the Commission's finding that new technologies have rendered the concept of spectrum scarcity irrelevant in analyzing the appropriate First Amendment standard. As First Media noted in its petition, the Commission's constitutional authority to regulate program content has historically been premised on the finding that broadcast spectrum is scarce and that access to broadcast channels is therefore limited. Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 386 (1969); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971); NAITPD v. FCC, 516 F.2d 526 (2d Cir. 1975). However, in Syracuse Peace Council the Commission revisited that premise and determined that because new technologies have now so greatly expanded the available means of program delivery, and because physical spectrum limitations do not logically justify reduced constitutional protection for broadcast media, the concept of scarcity is no longer relevant and cannot support the content regulation imposed by the Fairness Doctrine.[1/] First Media argues (and Geller, for one, agrees) that Syracuse removes the constitutional justification for PTAR as well, since PTAR (like the Fairness Doctrine) regulates the content of broadcast programming.

1/ Syracuse Peace Council, 2 FCC 2d 5043, 5055 (1987), recon. denied, 3 FCC Rcd 2035 (1988), affirmed sub nom., Syracuse Peace Council v. FCC, 867 F. 2d 654 (D.C. Cir. 1989), cert. denied, 110 S.Ct. 717 (1990).

II. PROCEDURAL ARGUMENTS

2. Media General raises several procedural objections to the ruling sought by First Media. Initially, Media General argues that a declaratory ruling is inappropriate because there is no uncertainty about the continued enforceability of PTAR. Media General Opposition at 3-4; see also, NATPE Opposition at 5, n. 1. That argument is belied, however, by the very comments already filed in this proceeding. While Media General, the ABC Affiliates, and NATPE urge that PTAR is enforceable, Geller agrees with First Media that PTAR is not enforceable after Syracuse. Geller Opposition at 2-3. Even INTV, while apparently arguing that PTAR remains enforceable, acknowledges a "shifting legal landscape" and agrees that First Media's petition raises "a serious constitutional issue of broadcast regulation." INTV Comments at 4. This divergence of views, even among those who oppose First Media's petition, clearly reflects uncertainty about the continued enforceability of PTAR in the wake of Syracuse.

3. Media General next challenges the Commission's authority to determine the constitutionality of its regulations, claiming that such authority rests exclusively with Article III courts. Media General Opposition at 4. This contention is nonsense. While Article III courts are, of course, the ultimate interpreters of the Constitution, it is well settled that the

Commission may consider constitutional principles under the public interest standard of the Communications Act. FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 795 (1978); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 122 (1973). Indeed, in Meredith Corp. v. FCC, 809 F.2d 863, 874 (D.C. Cir. 1987), the Court of Appeals directed the Commission to consider the constitutionality of the Fairness Doctrine (observing that continued enforcement of a regulation that the Commission itself believed to be unconstitutional might violate the Commissioners' oath of office). Hence, the Commission has not only the authority but an obligation to consider constitutional challenges to its regulations.[2/]

4. If Media General is saying that the Commission may not address constitutional issues in declaratory rulings, there is no apparent basis for that proposition. No such restriction appears in the language of Section 5(d) of the Administrative Procedure Act (5 U.S.C. §554(e)). Moreover, Media General's citation of Syracuse Peace Council v. FCC, supra, as indicating "the impropriety of the Commission rendering purely advisory constitutional rulings" is misplaced. At most, that case stands

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2/ The Commission obviously believes it has the authority to rule on First Media's petition. In its further notice of proposed rule making in the financial interest and syndication proceeding, the Commission stated that it plans to consider First Media's petition in a separate proceeding. Evaluation of the Syndication and Financial Interest Rules, 5 FCC Rcd 6463, 6471, n. 24 (1990).

for the proposition that the Commission (like courts) should not decide cases on constitutional grounds when it can decide them on non-constitutional grounds, and the further proposition that an agency's constitutional rulings are not entitled to special deference by the courts. This is far from saying that the Commission may not address constitutional issues in declaratory rulings. If the matter in question is a proper one for a declaratory ruling (i.e., "uncertainty"), then no reason appears why the Commission could not address constitutional issues in such a ruling. That is especially so where, as here, the uncertainty is created by the Commission's previous ruling on constitutional issues in the Fairness Doctrine context.

5. Media General next argues that a regulation is forever insulated from constitutional challenge once the courts have already passed on its constitutionality. Thus, says Media General, since Mt. Mansfield in 1971 and NAITPD in 1975 held that PTAR did not violate the First Amendment, the Commission may not now revisit the question. Media General Opposition at 4-6. However, in NAITPD the court made clear that Mt. Mansfield was "never intended to put the Commission in a straitjacket" and implicitly recognized that "experience might require modifications of the Prime Time Access Rule." 516 F.2d at 535. Thus, the court did not purport to make its own finding that PTAR was in the public interest. The court held only that the Commission had properly supported its public interest finding,

and that such finding was not inconsistent with the First Amendment. Nothing in either Mt. Mansfield or NAITPD precludes the Commission from revisiting the facts on which the agency originally based its public interest determination -- including facts that bear on spectrum scarcity.

6. Moreover, Syracuse itself reflects that an FCC regulation is not immune from later challenge simply because it was once upheld by the courts. In Syracuse, the Commission eliminated the Fairness Doctrine even though the Supreme Court in Red Lion had held the Fairness Doctrine to be constitutional in light of spectrum scarcity. The Court of Appeals affirmed, and the Supreme Court declined to review, the Commission's action in Syracuse. While the Court of Appeals did not reach the constitutional prong of the Commission's decision, it plainly recognized the Commission's right to reexamine spectrum scarcity as a justification for content regulation and to change its policy based on new facts. Syracuse Peace Council v. FCC, supra, 867 F.2d at 669.

III. THE CONSTITUTIONAL ISSUE

A. The Concept of "Spectrum Scarcity" Is No Longer Relevant to First Amendment Analysis

7. Geller agrees with First Media that PTAR is not constitutional in light of Syracuse. However, he would have the

Commission reverse Syracuse on the ground that demand for broadcast licenses exceeds the supply of available spectrum. Geller Opposition, App. at 7-8. While Media General and NATPE do not urge reversal of Syracuse, they too argue that because the spectrum is limited, PTAR remains a permissible means of assuring that independent program producers will have access to mass audiences. Media General Opposition at 9; NATPE Opposition at 8-10.

8. These arguments are flawed by their refusal to acknowledge that the physically limited broadcast spectrum is no longer the only practical means of audio/video communication to a mass audience. A programmer today does not need access to a broadcast station to reach a mass audience. Cable News Network (CNN) is not broadcast. HBO is not broadcast. ESPN is not broadcast. Financial News Network (FNN) is not broadcast. The Disney Channel is not broadcast. C-SPAN is not broadcast. USA Network is not broadcast. MTV is not broadcast. As these and countless other national, regional, and local audio/video programmers have now demonstrated, communication to a mass audience is perfectly feasible without the use of any broadcast spectrum. If programmers can bypass the spectrum altogether, the fact that the spectrum is physically limited no longer has relevance for First Amendment purposes.

9. For that reason, the President of the United States has recently urged that content regulation of broadcast

programming is no longer justified by the notion of spectrum scarcity. Explaining his unwillingness to sign the "Children's Television Act of 1990" into law, the President said:

> I recognize that the Supreme Court has upheld the application of certain content-based regulations to broadcast licensees, on the theory that the "scarcity of broadcast frequencies" makes government involvement inevitable. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Whatever the validity this analysis may have been thought to have some two decades ago, its factual premise has been eroded by the proliferation of new video services that supplement those provided by traditional broadcasters. Accordingly, a constitutional challenge to this legislation may provide the Supreme Court with an occasion to reconsider its decision in Red Lion.[3/]

10. The President's statement implicitly recognizes that radio and television stations were historically the only means of simultaneous audio/video transmission to a mass audience. In 1969, when Red Lion was decided, broadcasters exclusively controlled what programming was available to the public. Thus, they could act as private gatekeepers simply by controlling access to their facilities. PTAR was designed to prevent the major broadcast networks and their affiliates from exercising such control by denying independent producers access to the airwaves during prime time. Now, more than twenty years later, however, independent producers have access to a wide array of

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3/ Statement by the President, October 17, 1990, a copy of which is appended hereto as Attachment 1.

program outlets. As noted above, a program supplier who cannot gain access to a broadcast frequency can transmit programming to mass audiences by other means -- principally by cable, which has no spectrum limitation, but also by low power television stations, MMDS or wireless cable systems, or direct broadcast satellite.[4/] Neither broadcast licensees nor the networks are able any longer to act as private gatekeepers.

11. This fact is clearly understood not only by those like CNN or ESPN who have created their own cable channels, but by independent program producers, who now use alternate delivery systems to bypass the broadcast networks and reach audiences not accessible via broadcast stations. For example, Fox has contracted with a major cable system operator to create Fox affiliates on cable systems serving areas that do not have Fox broadcast affiliates. Broadcasting, September 10, 1990, p. 23. Similarly, King World, a major supplier of syndicated programs frequently run in the access period (like "Wheel of Fortune" and "Jeopardy"), has contracted with a cable system to program one cable channel exclusively with King World programming.

4/ Cable systems are increasingly creating local origination channels that are virtually indistinguishable from traditional broadcast stations. For example, the cable system in Rochester, New York, is currently programming one of its channels like an independent broadcast station, including local news and syndicated programming. See, e.g., Communications Daily, September 17, 1990, p. 11. Buckeye Cablevision in Toledo, Ohio, is also programming a cable channel with a block of off-network sitcoms, movies, and a rebroadcast of the evening news of the local NBC affiliate. Communications Daily, September 25, 1989.

Broadcasting, October 22, 1990, p. 39. Moreover, national cable channels like Lifetime and USA Network are now purchasing both off-network and original programming from producers for cable transmission. Among the programs recently acquired by Lifetime are "L.A. Law," "Spenser for Hire," and "The Days and Nights of Molly Dodd."[5/] USA Network has bought the rerun rights to "Miami Vice" and "Murder She Wrote."[6/]

12. Therefore, while not everyone with the economic means can hold a television license, anyone with the economic means today can transmit television programming to a mass audience by another technology. Since those who hold broadcast licenses no longer control access, the First Amendment analysis traditionally applied to broadcasters is no longer valid. Broadcasters today no more control video access to mass audiences than print publishers control print access. Just as access to publishing is physically unlimited, so too is access to video transmission. Thus, the Commission correctly determined in Syracuse that the concept of broadcast spectrum scarcity no longer justifies content regulation under the First Amendment. That determination does not, as Media General suggests, rewrite the laws of physics. Media General Opposition

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5/ "Cable Frontiers; Fresh Industry, New Opportunities; Women Fill Cable's Executive Vacuum," Washington Post, June 17, 1990.

6/ "TV-Basic," Gannet News Service, August 27, 1990.

at 8. It merely recognizes that technology has brought fundamental changes to the media marketplace.

13. There is no merit to NATPE's claim (Opposition at 9-10) that aggregation of broadcast channels and cable channels for purposes of First Amendment analysis is precluded by the Court of Appeals' observation that "the two media differ in constitutionally significant ways." Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1450 (D.C. Cir. 1985). The differences are constitutionally significant only if cable and broadcast are not aggregated, because if the two are aggregated, the limited capacity of the broadcast spectrum does not limit access to mass audience. Whether or not in light of technological considerations the two should be aggregated for this purpose is a policy matter within the Commission's province, at least in the first instance. And the Commission determined in Syracuse (two years after the Court's Quincy decision) that broadcast and cable should be aggregated for First Amendment purposes. There is no reason to suppose that the courts would not give appropriate deference to that administrative determination.

B. Metro Broadcasting Does Not Resolve the Constitutionality of Content-Based Regulation

14. Several commenters contend that Metro Broadcasting, Inc. v. FCC, 111 L Ed. 2d 445, 110 S.Ct. 2997 (1990), has reaffirmed the constitutionality of regulations based on

spectrum scarcity. Media General Opposition at 7-10; ABC Affiliates Opposition at 2, 6-7; Natpe Opposition at 7-8. This argument misreads Metro. In Metro, the Supreme Court held that minority ownership preferences designed to encourage broadcast diversity are permissible under the Equal Protection Clause. The Court accepted the finding by the Commission and Congress that minorities are underrepresented in broadcast ownership and that the purpose of the preferences was purely remedial. In light of those factors, the Court announced a new test for evaluating remedial race-based classifications: Congress may establish racial preferences when they **"serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives."** 111 L. Ed. at 463. The Court affirmed Congress' judgment that diversity of ownership of broadcast stations is an important governmental purpose because ownership diversity is presumed to enhance program diversity. In accepting the findings of Congress and the Commission, the Court did not purport to make findings of its own concerning either spectrum scarcity or program diversity.

15. The Metro holding in no way precludes the Commission from finding that the concept of spectrum scarcity can no longer support content-based regulation. Regulations restricting the content of certain classes of speech (the issue here) are subject to stricter scrutiny than regulations utilizing racial

classifications for a remedial purpose (the issue in Metro). The First Amendment guarantees broadcasters "the widest possible journalistic freedom consistent with their public obligations," and protects against the "risk of an enlargement of Government control over the content of broadcast discussion of public issues." FCC v. League of Women Voters, 468 U.S. 364, 379-80 (1984), quoting, Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 101, 126 (1973). Abridgment of these First Amendment guarantees may be upheld only if the **"restriction is narrowly tailored to further a substantial governmental interest."** FCC v. League of Women Voters, supra, at 380 (emphasis added). Therefore, while the Commission's minority ownership preferences were held to meet the less stringent "substantially related" test announced in Metro, it does not follow that PTAR meets the more stringent "narrowly tailored" test applicable to content regulation under the First Amendment, given the Commission's findings in Syracuse.

16. To the contrary, PTAR no longer meets the strict "narrowly tailored" test. Since video program providers can now reach mass audiences via cable without using the broadcast spectrum at all, a government content-based regulation mandating access to the spectrum is no longer necessary to assure that the public receives a wide variety of programming (the "substantial governmental interest" that PTAR is designed to serve). Because

PTAR is no longer necessary to achieve the governmental objective, it is no longer "narrowly tailored" to further that objective.

17. Media General and NATPE claim that the Supreme Court in Metro explicitly relied on the concept of spectrum scarcity as the basis for its decision and thus has resolved the issue. Media General Opposition at 10; NATPE Opposition at 7-8. This claim, too, fundamentally misreads Metro. To be sure, the Court did recite that it has historically recognized spectrum scarcity as justification for regulations designed to ensure that the public receives a diversity of views and information. 111 L.Ed. 2d at 464-65. However, the Court did not purport, and has never purported, to make its own independent finding of spectrum scarcity. It has simply recognized the spectrum scarcity finding of Congress and the Commission, whose province it is to make such factual determinations. The current state of spectrum scarcity (as found by the Commission in Syracuse) was not at issue in Metro. Therefore, Metro cannot be read as resolving, or even addressing, the issue of whether content-based regulation can constitutionally survive the Syracuse findings.

18. Seizing upon a footnote in Metro, several commenters contend that the Commission itself has said that Syracuse does not call into question the "regulations designed to promote diversity." Media General Opposition at 10-11; INTV Comments at 3; NATPE Opposition at 6-7. However, what the Commission

actually said is very different from the Court's footnote characterization. According to the Court (111 L.Ed. 2d at 479, n. 41):

> ...the Commission has expressly noted that its decision to abrogate the fairness doctrine does not in its view call into question its "regulations designed to promote diversity." Syracuse Peace Council (Reconsideration), 3 FCC Rcd 2035, 2041, n. 56 (1988).

What the Commission actually said was that its Fairness Doctrine decision did not call into question the constitutionality of "our content-neutral, structural regulations designed to promote diversity." Syracuse Peace Council (Reconsideration), 3 FCC Rcd 2035, 2041, n. 56 (1988) (emphasis added). The Court omitted the critical modifying language underlined above. While the minority preferences at issue in Metro are indeed structural in nature (they relate to ownership) and content-neutral (they do not turn on the substance of programming), PTAR is not a structural regulation and is not content-neutral. Thus, the Commission has never suggested that PTAR is exempt from the Syracuse rationale.[7/]

7/ NATPE erroneously argues that in Syracuse the Commission rejected only the concept of "numerical" scarcity, not the concept of "spectrum" (or allocational) scarcity, as a rationale justifying broadcast content regulation. NATPE Opposition at 6-7. To the contrary, the Commission explicitly rejected both, saying: "We do not believe that any scarcity rationale justifies differential First Amendment treatment of the print and broadcast media" 2 FCC Rcd at 5054 (emphasis added); and "[w]e simply believe (continued...)

C. PTAR Is a Content-Based Regulation

19. Equally without merit is the contention that PTAR is not content-based. Media General Opposition at 11-12, 16-17; NATPE Opposition at 10-11. Contrary to Media General's claim (at 16), a content-based regulation is not necessarily one that deals with "the presentation of controversial issues." This is clear from Regan v. Time, Inc., 468 U.S. 641 (1984), where the regulation in question prohibited photographic reproduction of United States currency. The Supreme Court held (id. at 648):

> A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. Under the statute, one photographic reproduction will be allowed and another disallowed solely because the government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not.

Although the photographic content in Regan thus had nothing to do with controversial issues, the regulation was deemed to be content-based simply because it turned on a government definition of content.

20. Similarly, the program definitions in PTAR inescapably turn on content. For example, Note 2 to Section 73.658 defines

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7/ (...continued)
that, in analyzing the appropriate standard to be applied to the electronic press, the concept of scarcity -- be it spectrum or numerical -- is irrelevant." Id. at 5055.

"documentary programs" as programs that are nonfictional and "educational or informational." This requires the Commission to determine, for example, whether or not a program is "educational." But the Supreme Court held in Regan that a regulation was unconstitutional if it permitted the government to determine whether or not the content of a message was "educational." Likewise, the Commission's definition of "public affairs programs" requires the Commission to determine whether the program "primarily" concerns "local, national, and international public affairs." The movie of George Orwell's "1984" might well qualify as a public affairs program under this definition, since it is quite arguably a "commentary" on "international public affairs." Other topical programs in entertainment format might qualify as commentary on public issues (abortion affirmative action, AIDS, etc.). Moreover, prime time network schedules carry many fact-based programs, such as "Rescue 911," which provides information about emergency procedures through the re-enactment and presentation of actual emergency responses to 911 telephone calls, and "Unsolved Mysteries," which often seeks public help in solving actual crimes. Such programs might or might not be deemed to qualify for exemption from PTAR as documentaries or public affairs programs. The point in all of these examples is that the Commission would have to make the determination based solely on the content of the program (which Regan holds is impermissible). Thus, PTAR is unquestionably a content-based regulation.

21. NATPE argues that PTAR is content-neutral because it does not tell licensees what they may or may not broadcast but merely orders them to give others the opportunity to broadcast. NATPE Opposition at 10-11, citing Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 480 (2d Cir. 1971). However, the Supreme Court expressly rejected such an argument in striking down a newspaper right-of-access statute. The Court held that although the statute did not prevent newspapers from saying anything they wished, it compelled them to publish something they might otherwise choose not to publish. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256-58 (1974). By the same token, PTAR compels licensees to broadcast programs other than those they might wish to broadcast during the access period. Contrary to NATPE's claim, this does not leave licensees "free to pick and choose the content of their programming as they please, regardless of the exemptions." NATPE Opposition at 11. A licensee that is barred during the access period from broadcasting entire categories of programs -- whether those programs are defined by content or by source -- is not a licensee free to pick and choose its programs. It is a licensee whose editorial judgment and control are restricted.

D. Market Share Is Irrelevant

22. Notwithstanding the foregoing considerations, NATPE seeks to justify continued enforcement of PTAR on the ground

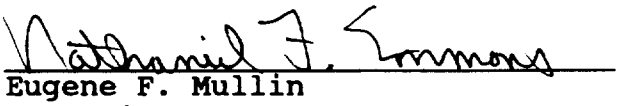
that the broadcast networks still have 64% of the prime time audience and remain the "dominant force" in determining prime time programming. NATPE Opposition at 9. However, First Amendment protections do not vary according to market share. The regulation of broadcast program content has historically been justified under the First Amendment solely on the basis of spectrum scarcity -- a consideration having nothing to do with audience ratings or market share. If there is no longer an inherent electromagnetic limitation on access to mass audiences, economic factors cannot substitute as a constitutional justification for content regulation. It may well be true that the broadcast networks have 64% of the prime time television audience. It is no doubt likewise true that the Miami Herald has at least 64% of the newspaper readership in Miami. But that fact does not constitutionally justify a regulation requiring the newspaper to give others access to its pages. Miami Herald Publishing Co. v. Tornillo, supra. For the same reason, market share considerations do not constitutionally justify PTAR.

IV. CONCLUSION

For the reasons stated here and in First Media's petition, the Commission should grant the petition and declare that PTAR is no longer constitutionally enforceable.

Respectfully submitted,

FIRST MEDIA CORPORATION

By: 

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